IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES J. TALMO and LORRAINE TALMO,	§	No. 596, 2011
Plaintiffs Below, Appellants,	§	Court Below: Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. 09C-06-258
UNION PARK AUTOMOTIVE,	§	
Defendant Below, Appellee.	§	

Submitted: February 22, 2012
Decided: March 7, 2012

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 7th day of March 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. James and Lorraine Talmo (the "Talmos"), the plaintiffs-below, appeal from the Superior Court's grant of summary judgment in a personal injury action in favor of Union Park Automotive ("Union Park"), the defendant-below. The Talmos claim the Superior Court erroneously shifted the burden to them, as non-movants, to show that there were material fact issues relating to whether Union Park's negligent maintenance of its property caused James Talmo to walk into a plate glass window on Union Park's premises. Because the Superior Court

properly found that the Talmos failed to establish a *prima facie* case that Union Park acted negligently, we affirm.

2. On July 2, 2007, James Talmo visited the Union Park car dealership in Wilmington, Delaware to consider purchasing a Honda CR-V. A salesman inside the dealership directed Mr. Talmo to the outside lot, where he could look at a CR-V. Believing that he was stepping outside, Talmo collided with a stationary plate glass, floor-to-ceiling window, and allegedly sustained physical injuries to his brain, head, back, right shoulder, hips, and left knee.

3. On June 25, 2009, the Talmos sued Union Park, seeking damages for personal injuries and loss of consortium. The Talmos claimed that Union Park had negligently maintained its premises by failing to: (i) provide "proper lighting" and a "safe environment," (ii) "take reasonable steps to adequately secure and make safe the premises," and (iii) "take precautions to prevent the plate glass window from becoming a danger." The Talmos also faulted Union Park for failing to "erect any warning signs or place any paper and/or notices on the plate glass window which would have warned . . . of the existence of the window."

4. On September 24, 2010, Union Park moved for summary judgment, on the ground that the Talmos had failed to procure an expert opinion explaining in what respects Union Park violated the appropriate standard of care. Union Park claimed that the issue of negligence in these circumstances was "one within the

knowledge of experts only and not within the common knowledge of laymen." On November 5, 2010, the Superior Court granted Union Park's motion for summary judgment, on the basis that the Talmos had failed to respond to Union Park's summary judgment motion by the court-ordered deadline. The Talmos then moved to vacate the Superior Court's judgment on the ground that their attorney had never received a copy of Union Park's summary judgment motion. The Superior Court denied the motion to vacate. The Talmos appealed to this Court, which vacated the judgment and remanded the case for a ruling on the summary judgment motion.[1] On remand, the Superior Court requested the Talmos to file a response to Union Park's motion for summary judgment. The Talmos did so, arguing that expert testimony was not necessary, because the issue of liability was within the common knowledge of the jury.

5. On November 1, 2011, the Superior Court granted summary judgment in favor of Union Park, holding that the Talmos had "failed to produce any evidence by which a jury could find that Union Park was negligent." The court determined that the parties' disagreement over the need for expert testimony was a "red herring," and that "[o]nce the burden shifted to [the Talmos], it was incumbent upon them to set forth specific facts in response to the motion beyond

[1] *Talmo v. Union Park Automotive*, 16 A.3d 938 (Del. 2011) (holding that the Superior Court abused its discretion when it granted summary judgment to Union Park, because the court apparently relied on an incorrect factual allegation made in Union Park's response).

the bare allegations of the complaint." Because the Talmos failed to set forth particularized facts, the Superior Court granted judgment for Union Park. This appeal followed.

6. On appeal, the Talmos claim that the Superior Court erred in holding that no genuine issues of material fact remained in dispute. The Talmos also claim that (i) the Superior Court impermissibly shifted to them, the non-moving parties, the burden of establishing a genuine issue of material fact and (ii) the burden should have remained with Union Park, the moving party. We review a Superior Court's grant of summary judgment *de novo*.[2] Summary judgment is appropriate when there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party.[3]

7. As a threshold matter, the Talmos' claim of improper burden shifting must fail. The issue of burden shifting is immaterial where the non-moving party "fail[s] to make a sufficient showing on an essential element of his or her case with

[2] *Hazel v. Delaware Supermarkets, Inc*., 953 A.2d 705, 708-09 (Del. 2008).

[3] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

respect to which he or she has the burden of proof."[4] Therefore, the focus of our review is upon the Superior Court's ruling that the Talmos failed to establish a *prima facie* case of negligence.[5]

8. Owners and occupiers of commercial property have a duty to maintain their premises in a reasonably safe condition for their customers, who qualify as business invitees under Delaware's premises liability common law.[6] But, patrons must also exercise reasonable care: they have an affirmative obligation to "exercise the sense of sight in a careful and intelligent manner to observe what a reasonable person would see."[7] In a personal injury action, the plaintiff-customer bears the burden of proving that: (i) there was an unsafe condition on the defendant's premises; (ii) the unsafe condition caused the plaintiff's injuries; and (iii) the

[4] *Id.* at 60 ("In *Celotex*, it was observed that when, after an adequate time for discovery, the nonmoving party has failed to make a sufficient showing on an essential element of its case, the standard for granting a motion for summary judgment mirrors the standard for a directed verdict.") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

[5] *Hazel*, 953 A.2d at 709 ("Because 'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial,' we must *first* determine whether [the plaintiff] made a showing sufficient to establish the existence of the essential elements of her negligence claim [on a summary judgment motion].") (Italics added).

[6] *DiOssi v. Maroney*, 548 A.2d 1361, 1366-67 (Del. 1988); *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964).

[7] *Walker v. Shoprite Supermarket, Inc.*, 864 A.2d 929 (Del. 2004) (quoting *Winkler v. Delaware State Fair, Inc.*, 608 A.2d 731 (Del. 1992)).

defendant had notice of the unsafe condition or should have discovered it by a reasonable inspection.[8]

9. Although the Talmos claim that genuine issues of material fact remain in dispute, the dispositive issue here is one of law—whether the Talmos established, *prima facie*, that Union Park failed to maintain reasonably safe premises. The Talmos make two specific arguments on this point—namely, that Union Park: (i) failed to put signs on its windows, or otherwise act, to warn customers of the existence of a window; and (ii) failed to provide "proper lighting." These arguments lack merit.

10. Owners and occupiers of property are under no duty to warn persons on their premises about the existence of windows.[9] As for the improper lighting claim, it is undisputed that James Talmo visited the car dealership during the day. Even accepting as true that the lighting in the store was not "proper," the Talmos' claim must fail as a matter of law, because any customer exercising reasonable care (as Talmo was required to do) would notice a window before walking into it,

[8] *Hazel*, 953 A.2d at 709.

[9] *Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 306 (Del. 1965) ("The existence or non-existence of a dangerous condition must depend upon the facts and circumstances of each case and is generally a question of fact for the jury to determine *except in very clear cases*.") (Italics added).

particularly in the daytime. Therefore, the Superior Court properly held as a matter of law that Union Park was entitled to summary judgment.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice